Central Law Journal.

St. Louis, Mo., December 16, 1921.

RENT LEGISLATION THAT FAILED.

A statute of the state of Texas provided that a tenant may recover twice the rental advanced, if the rental exceed one-third the value of the grain and one-fourth of the cotton crop. In Miller v. Branch, Tex. Civ. App., 233 S. W. 1032, the facts appeared as follows:

Appellant rented to appellee a certain tract of agricultural land for the period of time between January 1, 1919, and December 31, 1919, and for it the appellee paid in advance as rental $1,000 in cash. He cultivated the farm in grain and cotton during the year 1919 under the contract, and $1,000 was more than the total value of one-third of the grain and one-fourth of the cotton produced on the land. Under these facts it was alleged by appellee that the rental contract was null and void and in contravention of the provisions of article 5475, and that in these circumstances he was entitled to recover from appellant $2,000, double the amount of rent paid, as a penalty under the provisions of said article of the statutes. The appellee recovered judgment for the amount claimed, and appellant appealed upon various grounds assigned, among which the statute is assailed as being in contravention of the due process clause of the Constitution of Texas (article 1, § 19) and of § 1, article 14, of the Constitution of the United States.

In passing on the validity of the statute, the Court said:

"That the enactment is repugnant to both the state and federal Constitutions in the respects complained of by appellant is the opinion of this Court, for which reason we sustained the views presented to us in behalf of appellant. At the present term of court in passing upon another case involving the same contentions, we have construed the provision of the statute here assailed, and in that case already have held it to be in conflict with the above-mentioned respective constitutional provisions. The case is styled Rumbo v. Winterrowd, and is reported in 228 S. W. page 258. There our views and the reasons sustaining them are fully expressed. They apply precisely to the case here presented. No reason for modifying or extending any part of that opinion occurs to us in connection with the instant case, and we therefore merely refer to the Rumbo case, above cited, for a full expression of the conclusions of law upon which we dispose of this appeal."

Cases upholding the New York rent statute were hauled out in support of the validity of the Texas law, but the Court disposed of them in the following language: "Appellee cites, as in conflict with the decision of this Court in the Rumbo case, the case of People v. La Fetra, 230 N. Y. 429, 130 N. E. 601, recently decided by the Court of Appeals of New York, and the case of Block v. Hirsh, 255 U. S.—, 41 Sup. Ct. 458, 65 L. Ed.—, also recently decided by the Supreme Court of the United States. The constitutionality of legislation to regulate housing conditions in New York City was upheld in the former case, and a law designed for the same purpose in Washington was held to be constitutional in the latter. In both instances there were vigorous dissenting opinions. We deem it unnecessary to discuss at length the holding of the majority in either case.

"The grounds, however, upon which the validity of the enactments in those cases was declared are not present in the legislative act which our decision in the Rumbo case nullifies. We perceive no analogy whatever between either of those decisions and that in the case of Rumbo v. Winterrowd. The legislative acts under consideration in both of those cases were designed to meet an emergency arising out of the disordered conditions and turmoil resulting from the World War to which the inhabitants of those cities had fallen victim. Both measures were born of a

purpose, expressed in the legislative acts and recognized by the courts' decisions, to protect the public in a passing emergency in the nature of a public calamity for which the police power may always be invoked. The legislative acts pased upon in those cases were demanded to protect the health, the morals, and the general welfare of the public, which were ascertained to be threatened because of temporary abnormal conditions produced by world-wide warfare among all civilized peoples. The good of the whole public, in the situation dealt with, demanded suppression of the profiteer's greed as much as the public welfare demands suppression of the gamblers' depredations at all times. An examination of this Court's opinion in the Rumbo case reveals no statement questioning the right and authority of the legislature to bring into action the police power in such exigencies as those of which the legislative acts construed by the New York Court of Appeals and the Supreme Court took cognizance. But the situation and the conditions, to which the Texas statute construed by us in this case and the Rumbo case applies, are wholly disimilar to those passed upon in the cases cited. The act involved here arbitrarily imposed restrictions upon the classes to be affected in normal times, and as a permanent thing, destroying the right to contract with reference to a subject-matter unaffected by any public interest."

In the case of Block v. Hirsh, 255 U. S.—, 41 Sup. Ct. 458, the Court stated that the regulation there under consideration was put and justified only as a temporary measure. Further, in the same opinion the Court says: "Congress has stated the unquestionable embarrassment of government and danger to the public health in the existing conditions of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law."

In other words the legislation was upheld on acount of the abnormal condition brought about by the war.

B.

NOTES OF IMPORTANT DECISIONS.

RIGHT OF PRESIDENT OF CORPORATION TO ADMIT BANKRUPTCY.—It is quite an important question in the law of corporations whether the president of the corporation can commit the corporation either for or against insolvency by the filing of an answer to an involuntary petition in bankruptcy. The Circuit Court of Appeals (Second Cir.) held (one Judge dissenting) that he could do so where the directors were evenly divided over the question of confessing or denying bankruptcy. Regal Cleaners & Dyers v. Merlis, 274 Fed. 915.

In this case the petitioners filed a petition in the District Court to have the Regal Cleaners & Dyers, Inc., a New York corporation, adjudged an involuntary bankrupt. The grounds alleged were insolvency and a preference and transfer made in fraud of creditors. An answer was filed, denying the allegations of the petition. It alleged that the petition was filed as a result of a conspiracy to accomplish the ruin of the alleged bankrupt corporation. It was verified by its president. A petition was then filed to strike out the answer from the files of the court below and the appearance made by the attorneys for the corporation, on the ground that the appearance of the attorneys and the verification and filing of the answer were unauthorized acts. It is conceded that the board of directors did not authorize the filing of the answer. There are four directors of the corporation, two of whom appeared to want the corporation

to be adjudicated a bankrupt, and two of whom opposed. The question presented was, under these circumstances, is it the duty of a president, and may he, without authorization from the board of directors, file an answer placing in issue the allegations of a petition setting forth acts of bankruptcy consisting of fraud and deceit to hinder and delay its creditors while insolvent?

In holding that the president had not exceeded his authority the Court said:

"If there exists a defense to this petition, while ordinarily it is beyond the authority conferred upon a president of a corporation to interpose an answer, still circumstances may exist which, in equity, would require him filing an answer, although he has not the authority of a resolution of the board of directors of his corporation. If the company is solvent, for the president not to prevent such a result might cause irremediable injury, or perhaps total failure of justice to the stockholders. Under these circumstances, we think the president should, in the due performance of the duties of his office, verify and file an answer as such officer. Ordinarily he must make an earnest effort with the managing body of the corporation, the directors, to induce remedial action on their part, and this must be made apparent to the court. If he fails with the directors, he may then proceed. If he does not make request of the directors, he may show that a request would be futile. Such appears from the facts here. There is no showing that the directors have been requested and have refused, but it does expressly appear that two of the four directors are in favor of the adjudication in bankruptcy. Thus the vote is a tie. Under these circumstances, to apply to the directors for instructions would be futile. We think that the answer should be permitted to stand, and the issues as to the questions involved tried."

Justice Ward in dissenting, said:

"It is quite inconceivable to me that the president by virtue of his office can commit the company either way, more especially in a case like the present, where he is one of four directors who are equally divided in opinion and who own the whole capital stock of the company in equal shares. The attitude of the company is to be determined by the board of directors and when the board of directors is equally divided the company can neither resist nor consent to an adjudication. Therefore I think the motion to strike the answer and the appearance of attorneys in support of it from the files of the court as unauthorized by the company should have been granted. This would have left the court under § 18e of the Bankruptcy Act either to make an adjudication as upon default or to dismiss the petition, if any fatal legal defects appeared on the face of it. The court below did not know, and we do not know, which of these contesting parties was right. The question was purely one of law, and it seems to me that a practice is approved which may hereafter lead to dangerous consequences."

It seems to us that the majority of the Court reached the correct conclusion. If there was, in fact, a defense to be made to this proceeding some one should have set it up. Even a majority of the Board could not refuse to set up such a defense and if it did so any stockholder could intervene (at least in an equity suit) and set up a defense which the corporation should have made.

THE OBLIGATION OF FEDERAL JUDGES TO HOLD NO OTHER SALARIED POSITION, PUBLIC OR PRIVATE.*

Under the terms of the Constitution of the United States, the Judges of the Supreme Court and the inferior courts established by the Congress hold their offices during the good behavior and receive for their services a compensation which cannot be diminished during their continuance in office. (Const., Art. III, § 1).

The jurisdiction of all courts, except that of the Supreme Court, is derived from and is subject to the absolute control of Congress and may be taken away or changed at its pleasure (See Stuart v. Laird, 1 Cranch. 299; U. S. v. Haynes, 29 Fed. Rep., 691, 696). The District Courts of the United States were created by the Judiciary Act of 1789 in thirteen districts (Act of September 24, 1789, § 4) and as the country developed other districts have from time to time been created, so that there are now 78 judicial districts divided among nine judicial circuits.

The original jurisdiction conferred by the Judicial Code on the District Courts is embraced under twenty-five different heads (J. C., § 24), and covers practically all civil causes at law or in equity, admiralty, patent, trade mark and copyright law, bankruptcy, monopolies and revenue and postal

*This contribution took the form of a letter addressed to our contemporary, the *New York Law Journal*, by Mr. Justice Benedict of New York, and a copy sent to a New York member of Congress. It discusses an issue which has agitated the profession during the last year.

laws and other matters of civil jurisdiction, as well as of all crimes and offenses cognizable under the authority of the United States.

It is apparent that with the rapid growth in population there is at all times a corresponding growth in the number of cases cognizable by the District Courts. That this fact is being recognized in Congress, I refer to the table published in the *Congressional Record* recently, from statistics furnished by the office of the attorney-general and referred to in the remarks of Senator Spencer of Missouri on the "Dockets of the Federal Courts."

From this table and the debate in the Senate it is found that the number of cases commenced in 1920 was 91,254 as against 50,691 in 1912; the number of cases pending at the end of 1920 was 118,744 as against 102,299 at the end of 1912, and it was estimated that at the end of 1921 this number would increase to 140,000 cases, of which about one-half would be criminal and one half civil in character.

There is now pending in Congress a bill to increase the number of district judges by eighteen, and, in support of this measure, the Chief Justice of the United States has recently appeared before a committee of the Senate to urge the enactment of the measure.

It can hardly be doubted, in view of the condition of the dockets of the federal district courts of the country, that every one of the judges now charged with the duty of administering justice in these courts is urgently needed, in the language of the oath which he takes, faithfully and impartially to discharge and perform all duties incumbent upon him according to the best of his abilities and understanding, agreeably to the constitution and laws of the United States.

The district judges are clothed, under the Judicial Code, with very great power and authority, over the lives and property of the persons and corporations within the jurisdiction of the courts of the United States. In addition to the duties imposed on them as district judges they are competent to sit in the Circuit Court of Appeals within their own circuits.

They are furthermore authorized to sit anywhere in the United States when, on account of absence or inability of a district judge or of the accumulation or urgency of business, the public interests require that they shall be designated or appointed to sit in a circuit other than their own, and while so sitting to have the same powers as the judge of the district requiring such relief.

It is evident that the office of district judge is, under our laws, an office which demands and usually commands the very highest quality of judicial service. The district judge is selected by the President, by and with the advice and consent of the Senate, and holds his office practically for life, because although under the Constitution he holds it "during good behavior," he cannot be compelled to resign it, but has the option to resign after he shall have held his commission for ten years and has attained the age of seventy years, whereupon, during the residue of his life, he continues to receive the same salary as before his retirement.

The Constitution and laws have thrown around the office great safeguards for the maintenance of the independence of the court by giving the judge a tenure practically for life, with a fixed compensation which cannot be diminished, and by removing from him any necessity for engaging in politics in order to remain upon the Bench. No system ever devised by the wisdom of mankind was better calculated to create and maintain all those attributes of justice on which the whole framework of our judiciature rests.

More than 130 years ago Alexander Hamilton, in discussing the plan of the convention that all judges who may be appointed by the United States are to hold their offices during good behavior, wrote in the Federalist (No. 58): "The stand-

ard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable improvements in the practice of government." * * * "And it is the best expedient which can be devised in any government to secure a steady, upright and impartial administration of our laws."

The district courts are an integral part of the judicial power of the United States. That judicial power rests upon the foundation of the original purpose of the people of the United States to create and forever to maintain a cohesive force, binding the states in the Union and supported alone by the faith and respect of the people. Beyond and outside of this faith and respect the courts are the weakest branch of our government and are dependent for the enforcement of their judgments and for their own protection on the two other co-ordinate branches by which our system of republican government in our modern democracy is checked and balanced. These considerations may embody truisms, but they can never become platitudes so long as our system lasts.

Our courts are instrumentalities of government established by the people for the common good, not for the good of the judges who minister in them. Anything, therefore, which belittles or degrades our courts or judges, whether federal or state, and whether the court or judge be superior or inferior in function, threatens the destruction of the foundation on which the system rests, viz, the faith in and respect of the people for their courts.

In framing the Judicial Code of the United States, the Congress preserved the rule by which judges of the federal courts should not engage in the practice of the law or exercise the profession of counsel or attorney. Such provision was plainly intended to remove from the judges the temptation to neglect judicial duties for professional service as lawyers. It was plainly intended that, while serving as a judge, the incumbent should be removed from strife at the Bar; that he should not be an advocate after he had become an arbitrator; that his entire time, talents and thought should be devoted to the duties of his office; that thenceforth his life should be consecrated to the highest service that a man can render to his fellowman—that of awarding impartial judgment between them, being swayed by no consideration other than that of determining the very right of the matter.

Unfortunately, judges are only human instruments, differing in learning, in legal capacity, in breadth of vision and industry, and, unfortunately, in ethical perception as well. Hence it is wise and proper that there should be thrown around them, as individual members of the system, proper restrictions and limitations intended to preserve their independence of thought and action. I think that it never entered the minds of those who framed the Constitution and laws that a judge, while receiving the compensation of his office, should so far forget his sworn duty to the public as to engage in the service of another master for another and far greater compensation.

The people in this country have recently had revealed to them a spectacle of a federal judge who so far overlooked and disregarded, if he did not intentionally violate, every consideration of judicial propriety and ethical conduct as to accept a high position in connection with professional sport at a salary greatly in excess of the compensation he is receiving as a federal judge. Whatever may have been the motive which prompted the offer, and however dazzling the immediate reward may have seemed to its recipient, its acceptance involved a sacrifice of dignity and public esteem the humiliation of which the entire Bench of our land was forced to undergo. This untoward act has been the subject of well-merited re-

buke at the hands of a bar association representing the entire country. It deserves and should receive the most vigorous and outspoken condemnation from every judge, high and low, throughout the country. It deserves and should receive the indignant protest of every American who respects our republic and reverences its judiciary. No argument ought to be necessary to convince right-minded men and women of the dangers to our judicial system from such a course of conduct as this, and none will therefore be set forth here. But in the interest of justice and to remove the stain from the ermine of our entire judicial magistracy our national legislature ought to make such a thing forever impossible. To that end I am addressing this letter to you (as my district's Representative in Congress) to suggest the necessity and propriety of changing the present law to cover such a case. This can be done by amending § 258 of the Judicial Code by the insertion at the end of the first sentence of the following words: "Nor shall it be lawful for him, while holding such office, to hold any other office or position, public or private, from which he shall receive a salary or stated compensation," so that the entire section would read as follows:

"Section 258. It shall not be lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney or to be engaged in the practice of the law, *nor shall it be lawful for him, while holding such office, to hold any other office position, public or private, from which he shall receive a salary or stated compensation.*.. Any person offending against the prohibition of this section shall be deemed guilty of a high misdemeanor."

RUSSELL BENEDICT.

Brooklyn, N. Y.

SHARES TRANSFERRED IN SECURITY TO BANKS—PRACTICE AS TO RE-TRANSFER.

The Court of Session, the Supreme Civil Court in Scotland, has just had occasion to decide an important and novel question intimately affecting banking practice. Crerar v. Bank of Scotland,[1] was an application for an order on the Bank to produce before the Court, "a full and particular account of their intromissions with 2775 or thereby ordinary shares of Messrs. J. & P. Coats, Ltd., transferred by the plaintiff to the defendants in security of advances made by them to the plaintiff: and to grant decree against the defendants for payment to the plaintiff of such sum as may be found to be the true balance due to the plaintiff by the defendants in respect of their said intromissions . . . .; or in the event of the defendants failing to produce an account as aforesaid, to grant a decree against them for payment to the plaintiff of the sum of £25,000 sterling, which sum should in that event be held to be the balance due by the defendants to the plaintiff in respect of their said intromissions . . . ."

The defense of the Bank was that they could not account for the specific shares transferred to them, identifying each by its number, but that they could transfer the same number of ordinary shares of Messrs. J. & P. Coats, Ltd., to the plaintiff. Was this sufficient? To answer that question the Court found it necessary to examine the practice and course of dealing of the defendant bank.

Among the services which the bank offers to perform for its customers is that of providing financial accommodation of their system of "secured loan accounts." All securities held against these accounts are vested on *ex facia* absolute titles, in nominees of the Bank. These nominees are selected from among the bank's employees and act under the bank's instruc-

(1) 1921, 2 S. L. T. 112.

tions. They perform no function by themselves, as distinct from the bank, except as depositories of title. But in that capacity they come to be registered proprietors of large holdings of the better known Stock Exchange securities. The bank keeps a securities register in which each customer who opens a secured loan account is credited with whatever *quantity* of shares of stock of any denomination, belonging to him, is held from time to time against his secured loan account. This record takes no account of anything but quantity and denomination. As among stocks or shares of the same denomination held by the nominees, no attempt is made to identify (or to preserve evidence for the identification of) any particular or specified holdings (e. g. by the numbering of the shares or of the certificates) as being those transferred by, or held on behalf of, any particular customer. This mode of dealing with securities given to the bank is not restricted to secured loan accounts, but no question arises with regard to it in this case except in relation to accounts of that particular class.

Suppose a customer wants to open one of these accounts; he may himself transfer to the bank's nominees shares already registered in his own name, or he may arrange through his broker that the persons from whom he has purchased shares shall transfer these to the bank's nominees. In both cases the shares transferred are specific shares, identified and distinguished by number; but, while the customer is credited in the securities register with a corresponding quantity of shares of the same denomination, his specific (numbered) shares become mixed with and merged in the mass of similar shares held by the bank through its nominees. Especially in the case of shares transferred by the persons from whom the customer has purchased them, all trace of identity may be thus destroyed, for the transactions recorded in the securities register are too many and complicated to allow of tracing the identity of every particular transfer with a corresponding credit entry in the register. When the customer repays his loan, in whole or in part, and claims return or release of all or some of his shares, the requisite quantity of shares standing to his credit in the securities register is taken out of the mass and transferred to him; but the particular shares thus transferred are not (unless by accident) the particular shares (bearing the identical numbers) which he originally gave to the bank in security. The chances are that those particular shares have already been carried away by other customers who also had secured loan accounts against shares of the same denomination, and whose demands for release or return of their shares have been met by means of those particular shares.

The system offers special convenience in connection with Stock Exchange business, and the way in which it is used by brokers inter se, and by brokers in relation to their clients results in the almost complete obliteration of traceable distinction between particular customers' holdings as these are merged in the general mass. Stockbrokers usually have a secured loan account in their own names, for the accommodation of their clients, whose stocks and shares are employed as security therefor. This practice was under consideration in National Bank of Scotland v. Dickie's Tr's.[2] The state of transactions, as between one broker and another, and the inability or unwillingness of their clients to furnish the cash necessary to carry those transactions to their full conclusion, often makes it convenient that a *quantity* of shares standing to the credit of broker A should be transferred to the credit of broker B in the securities register. This is done by means of a "delivery letter" addressed to the bank. In such a case the mass of shares held by the bank's nominees remains unchanged, while broker B gets the same financial facilities with re-

(2) 22 R. 740.

spect to the quantity of shares mentioned, in the "delivery letter" as broker A did, but it is quite impossible to say which particular shares in the mass have come to be held on account of broker B which were formerly held on account of broker A. In like manner—suppose that a broker's purchasing client wants to hold a purchase of shares for a more or less considerable time, but is not in a position to furnish the cash to pay for them, then, if the state of the broker's transactions, as these have passed through the Stock Exchange Clearing House, is such as to enable him to supply the shares purchased out of other (selling) client's shares already on his hands (and employed as security for the secured loan account in his own name), all he has to do is to address a "delivery letter" to the bank instructing that a quantity of shares out of those standing to his credit in the bank's securities register, sufficient to implement the purchase, are to be held on account of the purchasing client. The latter is thus put in a position to open a secured loan account of his own. Again, however, it is impossible to say which particular shares in the mass have come to be held on account of the purchasing client.

The working of the system is rapid and simple; it avoids the delay and expense of repeated transfers and registrations; and it is much less open to risk of mistake and confusion than would be the case if each transaction were carried out with reference to numbered and registered shares. The striking feature of the system is that once the shares are transferred to the bank's nominees they are treated as being identical with and undistinguishable from any other shares of the same denomination which have been similarly transferred. By its own nature the system is inconsistent with the retention, or even the existence of any right of *specific* property, on the part of customers who avail themselves of it, in the shares which form the security for their loan accounts. This brings the relation between the bank and such customers into marked contrast with that of ordinary borrower and lender in a secured loan. *An ordinary lender has no right to do anything with the subject of the security held by him except what is necessary to effectuate the security, and subject to that qualification must hold and return it exactly as he got it.* It will be observed, however, that, in the very numerous cases in which the customer's right to the shares which form the security for his account is acquired by "delivery letter," the system is not necessarily inconsistent with the principles applying to an ordinary secured loan. All the customer has, and all the bank gets in security, in these cases is a right to a certain *quantity* of shares in the mass; and in that state of matters when release and return is demanded by the customer he has, even under the law applicable to an ordinary secured loan, no right to insist on being supplied with any particular numbered shares; for he gave no particular numbered shares to the bank. He must therefore, be content to accept any of those tendered to him out of the mass. Where, on the other hand, the customer has transferred, or has arranged with his broker that the persons selling to him should transfer, specific (numbered) shares, the system necessarily implies (and rests on) the condition that the customer surrenders his right to such specific or numbered shares in exchange for a right to a corresponding *quantity* of shares of the same denomination out of the general fluctuating mass in the hands of the bank's nominees.

The plaintiff in this case availed herself of the facilities afforded by the system described for many years in connection with Stock Exchange transactions of a more or less speculative character in the shares of J. & P. Coats. The shares which came to form security for her secured loan account did so in all the different ways above explained—largely by "delivery letter." But she now alleged that she was ignorant of the nature of the system, that neither the bank nor her brokers ever explained it to

her, and that she thought her relations with the bank were those of an ordinary borrower and lender in a secured loan. She therefore claimed that the bank must account to her for its intromissions with every specific share transferred to its nominees by her, or by persons from whom she purchased them, on her behalf. She also claimed an accounting in respect of the *quantities* of shares dealt with by "delivery letter," on the footing that it was the duty of the bank to set apart and earmark specific (numbered) shares against these letters. So far as the law of security goes, this appeared to be a hopeless claim. The bank had all along held and now tenders to her the like *quantity* of shares as they got on her account.

As regards, however, the shares transferred by plaintiff in security, the true question was whether the knowledge brought home to the plaintiff of the course of dealing, which the system implies and follows, is or is not enough to establish that she agreed to participate in and to be bound by it. "It is not necessary," said the Lord President, "that she should have fully comprehended the effects of that course of dealing; for it is a principle of evidence in relation to commercial contracts that they 'cannot be arranged by what people think in their inmost minds,' but according to what they say and do in their transactions together.[3] If it is proved that the plaintiff's employment of the bank and her transaction on secured loan account were in themselves inconsistent with the existence on the part of the bank of the duty which she says she thought they owed to her, viz., to hold specific shares against her account, she may be held to have agreed to all the terms and conditions of the system, even though she did not grasp their legal effect."

The Court were of opinion that knowledge and assent to a course of dealing was proved against the plaintiff and they dismissed her application.

(3) See per Lord Dunedin in Muirhead v. Turnbull & Dickson, 1905, 7F at p. 694.

It should be noted, however, that the ground of decision was that plaintiff's course of dealing barred her claim, otherwise the Bank would have been bound to retain specific shares. This was brought out by the Lord President in the following passage—"It is probably impossible to reduce the relations between a bank and a customer who avails himself of the complicated machinery of credit which a bank places at his disposal under any one chapter of legal rights and obligations. A bank is often said to be employed by its customers as their financial agent, and the characteristics of stability and integrity which are the indispensable conditions of their existence import, at some points in the field of agency covered by their functions, rights and powers which would be inadmissible at law in any ordinary agency. But I doubt whether, apart from proved custom of trade, or agreement, the fact that a customer employs his bank to provide him with financial accommodation on security could be held to cover an authority to convert the customer's right to specific (numbered) shares, transferred as security for his account, into a right to a corresponding *quantity* of shares out of a mass of shares of the same denomination, held for account of all its customers who employ it in the like manner. The evidence in the case does not amount to proof of custom of trade."

An argument was presented for the bank to the effect that the partnership interest vouched by a share is, in fact and in law, identical with and indistinguishable from the partnership interest vouched by any other share of the same denomination. But, notwithstanding the substantial identity of such shares, each individual numbered share represents a separate *jus crediti* and, if only for the purpose of tracing title, the person to whom a specific share belongs has a right and interest in it as such distinct from the partnership interest which it vouches. However convenient and useful both to the bank and to its customers the system of secured loan account may be,

it is not in the least necessary to effectuate the security which the bank holds for its indemnification, that the means of tracing the customer's title should be obliterated.

DONALD MACKAY.

Glasgow, Scotland.

HUSBAND AND WIFE—RIGHT OF WIFE TO RECOVER FOR INJURY TO HUSBAND

HIPP v. E. I. DUPONT DE NEMOURS & CO. 108 S. E. 318.

Supreme Court of North Carolina, Sept. 14, 1921.

In view of the status and rights of married women under Const. 1868, art 10, § 6, and C. S. § 2513, a wife may sue for damages to her from negligent injury of her husband, but can recover nothing which he could recover or which in case of his death from the injury his personal representative could recover.

The plaintiff, who is the wife of W. B. Hipp, brings this action alleging that her husband, while working as an employee of the defendant company in Hopewell, Va., was, "seriously, painfully, and permanently injured as a proximate result of the carelessness and negligence of the defendants," setting out the manner in which he was injured and the extent of such injuries and the expense, and that, under the law of Virginia, which is set out, the plaintiff was entitled, as a married woman, to sue and be sued as if she were unmarried, and to own and control her property as fully as if she had remained single, and that neither she nor her husband have received anything whatever from the defendants in the way of damages, for the serious injuries inflicted on him; and that her husband brought action in Virginia, but, notwithstanding three separate jury verdicts afforded him, the Court of Appeals of that State rendered judgment against him upon demurrer to the evidence; that the plaintiff is entitled notwithstanding to recover in this jurisdiction, she having obtained service upon the defendants, for the personal injuries inflicted on her by the injury to her husband. The defendants demur upon the ground that it appears upon the face of the complaint that judgment has been rendered in Virginia, that her husband was not entitled to recover, and that it appears inferentially therefore that under the law of the state of Virginia she has no action for the loss of her husband's company, for damages to her consequent upon injury sustained by him, caused by the negligence of a third person, where the husband's right of action, if any, is barred. The judge overruled the demurrer, and the defendants appealed.

CLARK, C. J. The demurrer admits all facts sufficiently pleaded, and therefore we must take it that the plaintiff's husband was "seriously, painfully, and permanently injured as the proximate result of the carelessness and negligence of the defendants," and that by reason thereof the plaintiff has suffered shock, which has impaired her nervous system, impaired and permanently injured and weakened her physical and mental condition, and that she has suffered greatly from loss of sleep, worry, and anxiety on account of the condition of her husband; in watching over and caring for him, causing her to devote her entire time to nursing and caring for him, while at the same time the burden of maintaining the family fell upon her, entailing heavy cost and expense, and that she has been forced to pay out large sums of money to hospitals, doctors, nurses, and medical expenses, and that by reason of said injuries she has been deprived of the support and maintenance which her husband would have given her, and has suffered mental anguish by being forced to witness the suffering endured by her husband, whereby her own nerves and health have been seriously and permanently shocked, weakened, and impaired; and that by reason of the physical and mental condition of her husband she still continues to suffer in mind and body, and has been denied the care, protection, consideration, companionship, aid, and society of her said husband, and the pleasure and assistance of her husband in escorting her to visit friends and relatives, and has been required to remain at home for long periods of time, denying herself to friends and relatives, and besides has had entailed upon her the fatigue of nursing and caring for him, and incurred expenses, and has paid large sums on that account. These matters are set out more at length in the complaint, but this is a summary of the grounds of her action—all of which allegations of facts are admitted as pleaded by the demurrer in effect presents two questions of law upon these facts:

(1) The first is that the judgment against her husband in Virginia (Dupont v. Hipp, 123 Va. 49, 96 S. E. 280) bars any right of action which she might have for damages for grief, mental anguish, labor, and expense devolving upon her by the disability of her husband and the loss and comfort of his society.

(2) The second is that upon the facts admitted the wife is not entitled to maintain this action.

As to the first ground of demurrer, if the wife has a cause of action we do not think the demurrer can be sustained. She was not a party to the action brought by her husband, and she is not estopped by the judgment as to any relief she might be entitled to. It many be that upon the trial of this action an entirely different state of facts as to the manner in which the husband was injured might be developed, either by additional evidence or by the estimate placed upon the evidence by the jury. She was neither a party nor a privy to that action.

In Laskowski v. People's Ice Co., 203 Mich. 186, 168 N. W. 940, 2 A. L. R. 586, it was held that—

"A judgment in favor of a wife in an action to recover damages for injuries to her person is not conclusive upon the question of defendant's negligence, and absence of her contributory negligence, in an action by her husband for the damages resulting to him from such injuries."

Of course the reverse must be true, since, as held in that case, under the Married Woman's Act, he was not a necessary or proper party to the action by his wife to recover damages for injuries to her person, and was not, in fact, a party. See notes to that case (2 A. L. R. 592) citing many cases that neither the judgment in such cases nor a settlement by compromise on the part of the wife would affect the husband's right to recover for the damages sustained by him, quoting among others R. R. v. Kinman, 182 Ky. 597, 206 S. W. 880.

But the second ground of demurrer presents an entirely different question. At common law the husband could maintain an action for the injuries sustained by his wife for the same reason that he could maintain an action for injuries to his horse, his slave, or any other property; that is to say, by reason of the fact that the wife was his chattel. This was usually presented in the euphemism that "by reason of the unity of marriage" such actions could be maintained by the husband. But singularly enough this was not correlative, and the wife could not maintain an action for injuries sustained by her husband. The reason is thus frankly stated by Blackstone:

"We may observe that in these relative injuries notice is only taken of the wrong done to the superior of the parties (husband) injured by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior (the wife) by such injuries is totally unregarded One reason for this may be this: That the inferior hath no kind of property in the company, care or assistance of the superior as the superior is held to have in those of the inferior, and therefore, the inferior can suffer no loss or injury." 3 Blackstone's Commentaries, 143.

By the married women's provision in the Constitution of 1868, art. 10, § 6, this conception of ownership by the husband whereby upon marriage all the personal property of the wife became the property of the husband, and he became the owner of her realty during his lifetime, was abolished. The courts in this state continued for a long while, notwithstanding, to hold that the husband could recover his wife's earnings and the damages for injuries done her; but by Acts 1913, c. 13, now C. S. § 2513, it was provided that her earnings and damages for torts inflicted upon her were her sole and separate property for which she could sue alone.

It follows therefore that the husband cannot sue to recover his wife's earnings, or damages for torts committed on her, and there is no reason why she can sue for torts or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband. We agree with the learned counsel for the plaintiff that if the husband could maintain an action to recover damages for torts on the wife she should be able to maintain an action on account of torts sustained by the husband. Such right of action, if it existed in favor of the husband, should exist in favor of the wife. It should be in favor of both or neither, but, in view of the Constitution of 1868 and our statute on the subject, we think that such action cannot be maintained by either on account of the injury to the other.

So far as injuries to the husband are concerned and the damages he has sustained, whether the plaintiff recovers or fails to do so the verdict and judgment are conclusive. The wife certainly cannot recover a second time for the injuries of the husband, who alone can sue for them (or, in case of wrongful death, his personal representative); but the action of the wife is not for the injuries to the husband, though formerly the husband was allowed to recover damages for the injuries sustained by the wife because they were his property. Price v. Electric Co., 160 N. C. 450, 76 S. E. 502. That is now swept away.

The cause of action for the wife in this case is not for the injuries to the husband, but for the injuries to herself, which are thus summed up in the brief for the plaintiff in this action:

(1) Expenses paid by her, made necessary by her husband's injuries.

(2) Services performed in nursing and caring for him.

(3) Loss of support and maintenance.

(4 Loss of consortium.

(5) Mental anguish.

Though the husband can no longer recover for the damages which his wife has sustained as property belonging to himself, he may still recover for the damages sustained by him by reason thereof which have been held to include expenses incurred, deprivation of society, and loss of aid and comfort.

In Kimberly v. Howland, 143 N. C. 398, 405, 55 S. E. 778, 781 (7 L. R. A. [N. S.] 545), the plaintiff's wife received a serious injury by reason of the defendant's negligence. The Court said:

"It is contended that the husband has sustained no injury, and as to him the motion to nonsuit should have been allowed. It seems to be well settled that where the injury to the wife is such that the husband receives a separate loss or damage, as where he is put to expense, or is deprived of the society or the services of his wife, he is entitled to recover therefor, and he may sue in his own name."

In Bailey v. Long, 172 N. C. 661, 90 S. E. 809, L. R. A. 1917B, 708, decided since chapter 13, Laws 1913, the plaintiff had taken his wife to the defendant's hospital. By reason of the defective condition and construction of said hospital, his wife contracted pneumonia and died. The plaintiff brought the action for damages suffered by him. Mr. Justice Brown, for a unanimous court, held that the plaintiff could recover for expenses which accrued to him for nursing and otherwise, and said:

"In addition, we think plaintiff can recover damages for the mental suffering and injury to his feelings in witnessing the agony and suffering of his wife while lingering with such cold and pneumonia, and in the act and article of death resulting therefrom."

We do not think that the husband could now recover compensatory damages for her physical and mental anguish, nor for the value of her services, which are matters purely personal to her, and for which she alone could recover, though formerly these were the basis for an action by the husband. As he can no longer sue for her earnings, of course, he is not entitled to recover the value of her services. But the great weight of authority sustains the proposition that, under the modern statutes enlarging the rights of married women, the husband is not deprived of his right to recover the damages which he himself sustains, and which are the direct consequences of the injury to the wife. He cannot sue for the injuries she sustained, but for those which accrued to himself as the direct and not the remote consequences of such wrongful act of the defendant. 13 R. C. L. § 642; 21 Cyc. 1527.

In Holleman v. Harward, 119 N. C. 150, 25 S. E. 972, 34 L. R. A. 803, 56 Am. St. Rep. 672, where the defendant had sold the plaintiff's wife laudanum or similar drugs despite the plaintiff's protests, the court held that the husband could recover for loss of companionship and loss of services resulting therefrom. While the statute now does not permit the husband to recover for loss of services, which must be recovered solely by the wife, the loss of the companionship of his wife is a loss purely personal to him, and the direct consequence of the wrong of the defendant. For this the wife could not recover, and being the direct and not remote consequence of the wrongful act the husband is entitled to his action.

In Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A. (N. S.) 360, Ann. Cas. 1913A, 983, where the defendant had sold drugs to the husband over the wife's protests, it was held in exact analogy to the above case from this court, that she could recover for the damages thus resulting to her.

One of the chief grounds for the plaintiff's recovery is the loss of consortium which was formerly pleaded by the phrase, "per quod consortium amisit." This formerly lay only in behalf of the husband, but now the term has been extended to give the wife, and with more reason, the same ground of action. The present state of the law is thus fully stated under the heading of Consortium, 12 Corpus Juris, 532, with full citations in the notes.

There are decisions from other courts denying relief to the wife in cases of this character. Such decisions are necessarily dependent upon two factors: (1) The legislation in reference to the rights of married women in the particular jurisdiction; (2) the attitude of the court in giving either a liberal or restricted construction to new legislation of the nature of that in this state. As was well said by Chief Justice Bond in the above case:

"So prone are the courts to cling to consuetudinary law, even after the reason for the custom has ceased or become a mere memory, that it has required hundreds of years to obtain the meed of justice for married women."

The reasons formerly advanced for a denial to the wife of a recovery for damages sustained by her as a direct result of the injury to him and which are over and above and distinct from the damages which could be recovered by the husband in an action by himself were threefold: (1) The merger of her identity into that of her husband; (2) her incapacity to sue; (3) the right of her

husband to recover full damages for his diminished earning capacity, with no corresponding right possessed by her.

Neither of the first two grounds are now valid in this state. It is urged, however, that the plaintiff, after he had obtained a recovery, is presumed to have obtained full pecuniary compensation for all the injuries sustained by him, and of course, if he failed to recover, no action can be maintained by the wife. This proposition is correct if the action of the wife is for the damages for which the husband could maintain an action, but the facts as admitted by this demurrer are that he was injured by the negligence of the defendants, and that the wife sustained damages, which, though flowing from the injuries to her husband, are purely injuries to herself, and for which the husband could not have maintained an action. She is therefore not barred by the judgment, favorable or unfavorable, in the action brought by her husband. A judgment in an action is not effective as a bar or estoppel in any other action unless between the same parties and for the same calse of action. The present action is not between the same parties nor for the same cause of action as in the litigation between the husband and the defendants.

It has always been held that the husband's action for damages sustained by him on account of injuries to her is not barred by judgment in favor of the same defendant in an action brought by the wife. See cases cited in the notes to 2 A. L. R. 592. Of course the reverse of the proposition is true. 13 R. C. L. § 461.

As already stated, the rights which the wife is asserting in this action are entirely separate and distinct from the grounds of recovery asserted by the husband in his action. In paragraph 12 of the complaint is the following allegation which is admitted by the demurrer to be true:

"That, by reason of the sudden and fearful injury of her husband as above stated, and by reason of being forced to look upon him in his horribly mutilated condition, she was shocked and frightened to such an extent that her entire nervous system was impaired and undermined and left permanently injured and weakened, and her physical and mental condition was permanently injured and impaired."

In Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778, the Court said:

"We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether willful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs."

This was cited and approved, Walker, J., May v. Telegraph Co., 157 N. C. 422, 72 S. E. 1059.

While the wife cannot recover for any damages for which the husband might have recovered (or for personal representative in the case of a wrongful death), we think that she could recover for those injuries which were sustained by her, and, being personal to her, for which the husband could not have recovered in his action. 15 A. & E. (2d Ed.) 861, which is cited in May v. Telegraph Co., 157, N. C. 423, 72 S. E. 1059.

We will not go more fully into the elements of damages which can be considered by the jury when the action goes back for a new trial.

It is objected by the defendant in this case that, if such action can be maintained by the wife, it can be sustained on the part of the children or other dependent relatives. That plea has never been found good when the action has been brought by the husband, and of course it cannot avail when the action is by the wife upon the same state of facts. The wife's cause of action arises from the nature of the relationship created by the contract of marriage as now recognized by our Constitution, and the laws replacing the former status, under which, by the common law, the husband was the sole personage. Such plea has not been held valid in an action for criminal conversation or for alienation of affections, or in any other case in which an action by either husband or wife has been brought for injury to the plaintiff (whether husband or wife), which were personal to the plaintiff therein, and for which the other party could not maintain an action. It does not depend upon the fiction of loss of services of the other party to the marriage, but is based upon the ground that the party bringing the action (whether husband or wife) has been directly injured by the wrongful conduct of the defendant.

It is sufficient to say that the plaintiff has a cause of action for those injuries which were sustained by her, and which are personal to herself, and the direct and not the remote consequences of the negligence of the defendants, which is admitted by the demurrer in this case; and the judgment overruling the demurrer must therefore be affirmed.

NOTE—*Right of Wife to Recover for Negligent Injury of Husband.*—In this connection see Cooley on Torts (Third Edition) 477; Jaynes v. Jaynes, 39 Hun (N. Y.) 40; Flandermeyer v. Cooper, 85 Ohio, 327; Holleman v. Harward, 119 N. C. 150; 13 R. C. L. 1460, § 509.

In the case of Bernhardt v. Perry, 276 Mo., 612, 208 S. W. 462, the court denied the right

of the wife to recover, but in a very able dissenting opinion Chief Justice Bond in part said: "The injury suffered by a husband from the loss of the consortium of his wife is no more direct or immediate than that sustained by her from the loss of his society, aid and affection. Hence, there is no logical basis for the reason upon which some of the adverse rulings are based, that in such cases the injury sustained by the wife is not directly and proximately caused by the wrongful act preventing her husband from giving her the means of a livelihood —which it is his duty to provide—and from performing his conjugal duties."

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM OF THE MEETING OF THE OKLAHOMA BAR ASSOCIATION

The annual meeting of the Oklahoma Bar Association will be held in Oklahoma City, Dec. 30 and 31, 1921, at the Huckins Hotel.

The president's address will be made by Mr. Preston C. West, of Tulsa. The annual address will be given by Hon. W. L. Frierson

There will be two papers: one by Mr. Russel G. Lowe, of Oklahoma City; the other by Mr. Irwin Donovan, of Muskogee. There will be the usual reports of committees; and the annual banquet will be held Thursday evening at 6:30.

PROGRAM OF THE MEETING OF THE VERMONT BAR ASSOCIATION.

The 44th annual meeting of the Vermont Bar Association will be held at Montpelier, Vermont, January 3-4, 1922.

At the afternoon session of January 3rd, the annual address will be delivered by the president, Hon. John W. Redmond, of Newport, Vermont. This will be followed by a memorial sketch of the life of the late Justice Seneca Haselton, by Hon. Robert Roberts, of Burlington. Also by a memorial sketch of the life of the late Hon. Charles A. Prouty, by Hon. George B. Young, of Montpelier, Vermont. The remainder of this afternoon session will be taken up with committee reports. The address at the evening session, which will be one of the chief events of the meeting, will be delivered by Hon. Alton B. Parker, of New York City.

The morning session of January 4th will be given over to further committee reports. Also at this session there will be a memorial sketch of the life of the late Chief Justice Loveland Munson, by Hon. James K. Batchelder, of Bennington, Vermont. Justice George M. Powers, of the Supreme Court of Vermont, will also deliver an address.

At the banquet on the evening of January afternoon session, there will be a memorial sketch of the life of the late Superior Judge Zed S. Stanton, by Hon. Frank Plumley, of Northfield, Vermont. Hon. Hale K. Darling, of Burlington, Vermont, will also deliver an address on the subject of "Declaratory Judgments."

At the banquet on the evening of January 4th, speeches will be made, it is expected, by Governor James Hartness, of Springfield, Vermont, by Hon. Henry F. Hurlbutt, of Boston, Mass., by a representative of the Bar of Montreal, and by a member of the Court.

HUMOR OF THE LAW.

Mrs. Profiteer was very proud of her daughter's connection with a smart private school.

"My dear," she said to her friend, "she's learning civics, if you please."

"What's civics?" asked her friend.

"Civics?" My dear, don't you know? Why, it's the science of interfering in public affairs." —*Argonaut*

"The poet says great men leave footprints in the sands of time."

"There are different kinds of footprints," repoined Senator Sorghum, thoughtfully. "Some we observe in the hope of following them, and others we inspect like detectives looking for clues."—*Washington Star.*

An English clergyman, Father Black, spent a great deal of his time visiting prisons and trying to reform the inmates. On one occasion a housebreaker said to him gratefully: "I must thank you, sir, for what you have done for me. There was a time when I knew nothing of God or of the Devil either, but somehow you have made me love 'em both."—*Boston Transcript.*

"No! You cannot expect the jury to believe that," said the lawyer. "Do you really mean to say that although the night was pitch dark, and you were at one end of the train, you saw the deceased fall from the other? Now tell me, how far can you see at night?"

"Oh, about a million miles I reckon," retorted the witness, "I can see the moon—how far's that?"

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Accord and Satisfaction**—Full Settlement.—In an action by plaintiff for damages for non-delivery of one item of a bill of merchandise, draft having been tendered for other items, less deduction for non-delivery, in full settlement to date, acceptance of draft by defendant would have settled all claims growing out of the controversy, and a complete answer to plaintiff's cause of action and judgment would have gone against plaintiff for costs.—Oswell v. Martin, N. Y., 190 N. Y. S. 202.

2. **Agriculture**—Inferior Fertilizer.—In action for purchase price of fertilizers, where defendant counterclaimed that fertilizers were of an inferior quality, and not the standard guaranteed, and that by their use defendant had lost $2,000 above the price of the fertilizers, it was error to permit testimony of one of the defendants that in his opinion the cause of the failure of his potato crop was the fertilizer, the warranty, if any, being as to the ingredients, and not as to results, and testimony being uncertain and speculative; and it was also error to admit testimony that defendants would have obtained better results on other crops if standard fertilizer had been used, and testimony as to size of crops in other years.—Penniman v. Blank, N. J., 115 Atl. 1.

3. **Aliens**—Ownership of Land.—The Fourteenth Amendment to the Constitution held not to give a citizen the right to sell or lease land to an alien prohibited by the laws of the state from acquiring land by purchase or lease.—Terrace v. Thompson, U. S. D. C., 274 Fed. 841.

4. **Automobiles**—Use by Son.—In an action for injury caused by defendant's son in negligently operating the father's automobile, held, that an admission that the son was driving his father's car with the knowledge of the father justifies the inference that it was done with the father's consent.—Duncan v. Overton, N. C., 108 S. E. 387.

5. **Bankruptcy**—Exemptions.—Despite Comp. Laws Mich. 1915, § 12865, under sections 12861, 12862, bankrupt, who elected to take her exemptions in cash out of the proceeds of the sale of her stock of goods, held obliged to take the amount for which such exemptions sold, that is, the pro rata of the amount received as the proceeds of her assets at the sale; she not being entitled, no selection having been made by her of her exemptions, to the full amount of her exemptions as authorized by law.—In re Moore, U. S. D. C., 274 Fed. 645.

6.——Unauthorized Note.— Where it was agreed between owner of a corporation and purchaser of its business, to enable purchaser to retain lease, that purchaser should buy the fixtures, lease and merchandise on hand, and that the owner of the corporation should pay the existing indebtedness and transfer the corporate stock to the purchaser, and such owner in part payment of the amount due from the purchaser, took notes executed by purchaser in the name of the corporation in an amount much less than the amount of indebtedness assumed, discounted the notes, and used the proceeds to pay the balance of the corporation's indebtedness, so that as a result of the transaction the indebtedness of the corporation was the amount of such notes, instead of the much greater indebtedness assumed, the corporation's trustee in bankruptcy could not recover amount of notes from former owner, on theory that he took the corporation's unauthorized notes to pay personal debt of such purchaser.—Saperson v. Burstein, U. S. C. C. A., 274 Fed. 797.

7. **Banks and Banking**—Liability of Directors.—The requirement of Banking Act, § 19, that the State Bank Commissioner report irregularities of any bank officer to the bank's directors does not limit the directors' liability for negligent mismanagement to cases where such report has been made to them; the purpose of the provision being rather to enlarge than to limit their liability.—Creamery Package Mfg. Co. v. Wilhite, Ark., 233 S. W. 710.

8. **Bills and Notes**—Misrepresentation.—The general rule is, where a party executes a note and signs a statement or makes representations that the obligation is valid, and there is no defense to it, he is estopped to resist payment, in an action by a person who has taken the paper relying on his representations, and he will be precluded from setting up a defense which would have been good as between the original parties. However, to render this rule operative the representations must be outside of the face of the obligation, and even though they are thus disconnected, if they are made simultaneous with the execution of the obligation, so that there is in effect but a single transaction, no estoppel will arise.—Le Roy v. Meadows, Okla., 200 Pac. 858.

9. **Brokers**—Fraud.—Purchasers from agent held entitled to rescind for fraud and recover amount paid to agent who was to receive excess over fixed price.—Berry v. Roth, Minn., 184 N. W. 274.

10. **Carriers of Goods**—Bill of Lading.—Under Bills of Lading Act, Aug. 29, 1916, § 20, where a carrier loads package freight, like cotton in bales, it is required to state in the bill of lading only the number of packages and such marks or description as will serve to identify them, and a further statement in an order bill for baled cotton of the weight of the shipment is voluntary and gratuitous, and where qualified by the words "subject to correction," does not render the carrier liable to a holder of the bill,

under section 22 (section 8604 kk) for a shortage in the weight.—Leigh Ellis & Co. v. Payne, U. S. D. C., 272 Fed. 443.

11.——Delivery.—In an action for failure to deliver an express package, a receipt purporting to be from J. F. P. was not proof of delivery to Josie P., the consignee.—American Ry. Express Co. v. Powell, Ala., 89 So. 546.

12.——Joint Rates.—Where an express company filed a schedule of joint rates with another express company, a public utility commission may not, by striking out clauses of the schedule without notice or hearing, extend these joint rates, since to do so would amount to an institution of rates, while the utility commission is limited to a making of rates.—American Ry. Express Co. v. Railroad Commission, U. S. D. C., 274 Fed. 649.

13. **Carriers of Passengers** — Contributory Negligence.—In an action for death occurring in New Jersey, the federal court follows the rule of the state court that, to entitle plaintiff to recover under the last clear chance doctrine, defendant's negligence must be so gross as to imply a disregard of consequences or a willingness to inflict injury.—Houston v. Delaware, L. & W. R. Co., U. S. C. C. A., 274 Fed. 599.

14.——Due Care.—Any one in proper condition, taking hold of the handle bar of an electric car, placing his foot on the step, and beginning to enter was a passenger, if the car was at a regular stopping place in the street for the purpose of receiving passengers, and persons were invited to enter and become passengers.—Franz v. Holyoke St. Ry. Co., Mass., 132 N. E. 270.

15. **Certiorari**—Laches.—The established rule in civil service proceedings involving the holding of a position that an action is barred by laches unless review is brought by certiorari within six months does not apply to the review of proceedings for detachment of territory from a district where nothing has been done by the authorities which would cause great public inconvenience or detriment if the proceedings were quashed.—Jackson v. Blair, Ill., 132 N. E. 221.

16. **Constitutional Law**—City Ordinance.—The provision of Const. S. D. art. 6, § 12, that "no law making any irrevocable grant of privileges, franchises or immunity shall be passed," held not violated by a city ordinance granting a franchise for a term of years to an electric company, including a contract fixing rates to be charged by the company.—Water, Light & Power Co. v. City of Hot Springs, S. D., U. S. D. C., 274 Fed. 827.

17.——Mixed Marriages.—Or. L. §§ 2163-2165, prohibiting marriages between white persons and Indians, Negroes, or Chinese, etc., are not unconstitutional as discriminating between the races.—In re Paquet's Estate, Ore., 200 Pac. 911.

18.——Right of Assembly.—The guaranties by Bill of Rights, § 16, of right of assembly and by sections 5 and 6 of free speech, which shall not be curtailed, are to "citizens," and so do not avail aliens.—State v. Sinchuk, Conn., 115 Atl. 33.

19. **Contempt**—Indirect.—Although no battery was committed, an assault on a juror for returning a verdict adverse to defendant, by threatening gestures and abusive language, is sufficient, under C. S. § 984, to constitute an indirect contempt of court, as tending "to impede and hinder the proceedings of the court and to impair the respect and authority for the proceedings of the court."—In re Fountain, N. C., 108 S. E. 342.

20. **Contracts**—Breach.—Where work was to be done according to plans and specifications on file, the owner, or the one engaging the work done, will be deemed to have warranted their sufficiency, and the contractor may recover, where they were changed and such change caused injury.—Bates & Rogers Const. Co. v. Board of Com'rs, U. S. D C., 274 Fed. 659.

21. **Covenants**—Building Restrictions.—In lot owner's suit to enjoin construction of a building too near the street line in violation of a building restriction, plaintiffs' infractions in encroaching on the line to an extent of from 1 to 18 inches held to be minor infractions, not estopping them from enjoining a gross infraction of the restriction.—McNair v. Raymond, Mich., 184 N. W. 412.

22. **Divorce**—Injunction.—Where a husband is shown not to have acquired the necessary residence in another state to prosecute his suit for divorce against plaintiff, he may be enjoined from carrying on such suit.—Gwathmey v. Gwathmey, N. Y., 190 N. Y. S. 199.

23.——Insanity.—Laws 1921, c 63, amending C. S. § 1659, subd. 4, providing that suit by the party injured for divorce may be maintained where separation for five years has been by mutual consent, or wrongful act of at least one of the parties, or by judicial decree, does not apply to separation from confinement in the state hospital for the insane because of insanity.—Lee v. Lee, N. C., 108 S. E. 352.

24. **Fences**—Repair.—In action against adjoining owner for damage to cattle caused by defendant's breach of agreement to keep his portion of division fence in repair, involving a question as to existence of agreement, defendant's action in repairing a part of his portion of fence, on plaintiff's notice to him that plaintiff's cattle were going through fence, and in repairing the other part of such portion after plaintiff's cattle had been injured, held to warrant jury finding that repairs were made pursuant to such an agreement.—Osgood v. Names, Iowa, 184 N. W. 331.

25. **Fraudulent Conveyances** — Insolvency. — Where an insolvent made payments on property held by his wife, such payments were fraudulent as to his creditors, and in a creditor's suit against him and the wife it was not error to decree that the property should be subjected to the payment of such sums.—McKey v. McCoid, Ill., 132 N. E. 233.

26. **Highways**—Duty of Automobilist.—If the vision of an automobilist was obscured by the glaring lights of an approaching car, it was his duty to slacken his speed and have his car under such control that he might stop it immediately, if necessary.—Budnick v. Petersen, Mich., 184 N. W. 493.

27. **Innkeepers**—Negligence.—The fact that a plaintiff at the time he suffers injury to his person and property from the negligence of the defendant was doing some unlawful act will not prevent a recovery unless the act was of such a character as would voluntarily tend to produce the injury.—Jones v. Bland, N. C., 108 S. E. 344.

28. **Insurance** — Change of Beneficiary. — Where assured agreed with his wife that she should receive the beneficial interest in the certificate of insurance upon and by reason of payments by her of the premiums, such contract was binding on the assured and deprived him of the right to change the beneficiary without her consent.—Columbian Circle v. Mudra, Ill., 132 N. E. 213.

29.——Option.—A contract of sale of an insured house which was but an option, did not pass any title or interest in the property to the grantee and did not divest insured of title to the property within a provision that the policy should be void on change in title or interest of insured.—Home Ins. Co. v. Chowning, Ky., 233 S. W. 731.

30.——Surety Bonds.—Where a street paving contractor's surety, though in the hands of receivers, had not been declared insolvent, such contractor, on executing new surety bonds in another company at the city's request, could not recover from the receivers the total unearned premiums on the old bonds from the date of the receivership, in the absence of evidence of any default thereon or of the surety's inability to pay in case of such default, but the new bonds having been substituted with the consent of the court and receivers with the understand-

ing that by their execution the company and its receivers were released from further liability, the contractor could recover the amount paid for the new bonds.—Barber Asphalt Paving Co. v. Poe, Md. 115 Atl. 24.

31. **Intoxicating Liquors**—Intent.—Under the Constitution and statute laws of this state, the sale and keeping for sale of all intoxicating beverages is prohibited. The Legislature, in the exercise of its police power, has the right to prohibit and has prohibited the sale and keeping for sale of wine, ale, beer and substitutes therefor, not necessarily intoxicating.—Coury v. State, Okla., 200 Pac. 871.

32.——Substantial Evidence.—The fact that the purchaser of whisky from defendant, charged with violation of the War-Time Prohibition Act, was employed and paid by the Dry Maintenance League to obtain evidence of the violation of the act, did not disqualify him as a witness or prevent a conviction on his uncorroborated testimony.—Rose v. United States, U. S. C. C. A., 274 Fed. 245.

33.——Tax.—The penalty of from $500 to $1,000 a day imposed by Act Ky. March 12, 1920 (Laws 1920, c. 13), for non-payment of the tax thereby imposed on the business of owning and storing spirits in bonded warehouse and removing them therefrom is oppressive in the absence of any provision for an opportunity to test the law, especially as the penalty for willful refusal to pay the tax on 10,000 gallons could not be more than twice as much as it must be for careless neglect to pay on one gallon.—J. & A. Frieberg Co. v. Dawson, U. S. D. C., 274 Fed. 420.

34.——Use of Property.—To show constructive notice which will render subject to forfeiture land used by tenant in possession in connection with manufacturing of prohibited liquors under Acts 1919, p. 12, § 12, the state must show a state of facts that would put a prudent owner upon inquiry and which would lead to the discovery of such facts as would lead to a knowledge of the existence of the apparatus or appliances used.—State v. Jebeles, Ala., 89 So. 547.

35. **Life Estates**—Use of Land.—A tenant holding under a devise of land "during widowhood" has the right to use the land and pine trees growing thereon by hacking and otherwise working the trees for turpentine purposes, as against a person entitled in reversion, where prior to his death the testator used the land and trees for such purposes.—Lee & Bradshaw v. Rogers, Ga., 108 S. E. 371.

36. **Mandamus**—Election Contest.—Where an order sustaining a special demurrer to a petition in a contest of a primary election was not appealable and the conditions show a right to mandamus, and where a determination of an appeal from a dismissal of the action would be too late for the election, a writ of mandamus is the only effective remedy and will issue.—Williams v. Howard, Ky., 233 S. W. 753.

37. **Master and Servant**—Assumption of Risk.—Under Act April 22, 1908, §§ 3, 4; Act April 14, 1910, § 2, and Act March 2, 1893, § 8, a railroad company's duty to equip and maintain cars with sufficient and adequate brakes was an absolute one, and if it failed to do so an injured brakeman's contributory negligence or assumption of risk was immaterial.—Payne v. Connor, U. S. C. C. A., 274 Fed. 497.

38.——Recovery.—Under Workmen's Compensation Act providing that, where injuries are caused by third persons, an employer, having paid the compensation or become liable therefor, may recover in his own name or that of the employee from the person in whom liability exists, an employer, who has neither paid nor become liable to pay, has no right of action, in his own behalf nor for the indemnity company which paid the award, against a third person causing injury to an employee.—Henderson Tel. & Tel. Co. v. Owensboro Home Tel. & Tel. Co., Ky., 233 S. W. 743.

39. **Municipal Corporations**—Abutting Ownership.—Such abutting owner has exclusive right to the soil, subject only, in general, to the easement or the right of passage in the public and the incidental right of properly fitting the street or highway for use and keeping it so. 2 Elliott on Roads and Streets (3d Ed.) 311, § 876, note 6. In other words, such proprietor has all the usual rights and remedies of the owner of the freehold, subject only to the public easement; and the trees growing thereon belong to him, unless needed to repair the way.—Long v. Faulkner, Ga., 108 S. E. 370.

40.——Negligence.—A city, in collecting, distributing and vending water being engaged in the management of its property for its own corporate benefit or profit and that of its inhabitants, cannot plead governmental immunity for injuries caused by the negligent acts of one employed by it to guard a municipal reservoir.—Richmond v. City of Norwich, Conn., 115 Atl. 11.

41.——Void Assessment.—Equity will enjoin collection of special assessment for repair or reconstruction of pavement where absolutely void, but not where the assessment is merely voidable, since in such case the statutory remedy by filing objection with the city council under Code, § 824, must be pursued.—Manning v. City of Ames, Iowa, 184 N. W. 347.

42. **Navigable Waters**—Riparian Rights.—An application by a riparian owner for an order fixing damages for decrease in rental value and arrested development on account of pollution of a stream on the claim that conditions had changed since a decree was entered refusing an injunction and providing for payments to riparian owners at stated times, while the pollution continued, must be denied where there is no showing of change in conditions since the decree.—Doremus v. City of Paterson, N. J., 115 Atl. 3.

43. **Negligence** — Contributory Negligence. — Under the federal Employers' Liability Act, all recovery is not barred by the fact of the employee's contributory negligence being gross and that of the employer being slight.—Templeton v. Charleston & W. C. Ry. Co., S. C., 108 S. E. 363.

44.——Imputability.—The negligence of the driver of an automobile was not so clearly imputable as matter of law to an employee of the driver, riding in the rear seat on an errand of her own, and testifying that she had nothing to do with driving the car and had never driven one, as to warrant the affirmance of a judgment on a directed verdict for defendant, where the question of imputed negligence had not been considered by the trial court.—Begert v. Payne, U. S. C. C. A., 274 Fed. 784.

45. **Perpetuities**—Life Beneficiaries.—A trust deed directing the trustee to pay half the income from the trust property to grantor and one-fourth to each of two other beneficiaries during their respective lives, and at the death of each beneficiary to convey a like proportion to her heirs at law, did not create an unlawful perpetuity, though there was no direction to separate the corpus into three parts, separate trusts being created for each life beneficiary, each to continue for only one life in being and each beneficiary's proportionate share of the corpus being freed from the trust and becoming alienable on her death, so that their interests were separate, though the trust property was to be administered in solido.—Cary v. Carman, N. Y., 190 N. Y. S. 193.

46. **Physicians and Surgeons**—X-Ray.—In an action against a physician for injuries caused by X-ray machine, where question was safety of machine, and not its efficiency, and all experts testified that the machine used was all right so far as safety was concerned when used with proper safety devices, there was no necessity for submitting to the jury any issue involving the exercise of care and knowledge in the selection of a machine.—Street v. Hodgson, Md., 115 Atl. 27.

47. **Railroads** — Contributory Negligence. — Omission of one working on a crane on a rail-

road track to place red flags several hundred feet distant from the crane, between it and any approaching train a duty imposed upon him, although a fact which, with other facts, may be considered by the jury as showing contributory negligence, did not constitute contributory negligence as matter of law.—London Guarantee & Accident Co. v. Southern Pacific Co., Cal., 200 Pac. 805.

48. **Taxation**—"Discrimination."—Act denying to national bank shareholders exemption of federal securities held by corporation as assets held not discriminatory in favor of private bankers.—Des Moines Nat. Bank v. Fairweather, Iowa, 184 N. W. 313.

49. **Sales**—Breach of Warranty.—The purchaser of goods, being liable for the price on his election to retain the property, does not waive a breach of warranty by promising unconditionally to pay for the goods subsequently to the breach, though his promise is a circumstance for the jury to consider on the question whether or not there has actually been a breach.—Parrott Tractor Co. v. Brownfiel, Ark., 233 S. W. 706.

50.——Breach of Contract.—In an action for breach of a contract to buy cocoanut oil, where defendant failed to give shipping instructions and to furnish a bank credit, as agreed, it was not necessary for the plaintiff, in order to show readiness to deliver the oil, to establish that he had it in stock; defendant's breach of contract excusing further performance by plaintiff, of whom was required only such readiness as was necessary to enable him to make delivery at the time fixed for delivery, such oil being obtainable in the market at the time fixed for delivery.—Krauter v. Simonin, U. S. C. C. A., 274 Fed. 791.

51.——Implied Warranty.—Where fertilizer is sold by the manufacturer, a stronger warranty is implied than in the ordinary sale of goods that the fertilizer was reasonably adapted to the purposes for which it is purchased, and this implied warranty is independent of the manufacturer's negligence.—Patterson v. Orangeburg Fertilizer Co., S. C., 108 S. E. 401.

52. **Specific Performance**—Undisclosed Principal.—The fact that the statute of frauds is involved does not prevent an undisclosed principal enforcing a written contract made for him by his agent in his agent's name.—Lagumis v. Gerard, N. Y., 190 N. Y. S. 207.

53. **Street Railroads**—Contributory Negligence.—A practical and reasonable construction of Motor Vehicle Act, § 20, as amended by St. 1919, p. 216, providing for signals on changing direction, does not require the driver of a motor vehicle upon every deviation from a direct course ahead to look back to ascertain the condition of traffic behind him; such situations being covered by duty to use ordinary care.—Noce v. United Railroads, Cal., 200 Pac. 819.

54. **Sunday**—Photographers.—Sunday observance statute held legitimate exercise of police power when applied to photographers.—State v. Dean, Minn., 184 N. W. 275

55. **Trusts**—Liability of Surety.—Where the corpus of a trust was managed by a resident trustee, and had never been in the control of foreign trustee, whose only duty was to forward the income to the cestui que trustent after the resident trustee sent it to him, and who, on failure of the resident trustee to send the income, gave prompt notice of the failure, the foreign trustee is not liable for default of the resident trustee.—Broome v. Mordecai, S. C., 108 S. E. 407.

56. **Vendor and Purchaser**—Fraud.—In vendor's action to set aside, for fraud, contract to sell land at $200 per acre, in which it was claimed that plaintiff had been fraudulently induced by administrator of her father's estate to sell the land which she had inherited from her father for an inadequate price, evidence that the land was worth $250 an acre held insufficient to warrant submission of case to jury.—Herwehe v. Schultz, Iowa, 184 N. W. 289.

57. **Wills**—Bequest of Employee.—An electrician occupying with his family a cottage on testator's estate and performing services in connection with the electrical equipment of the premises, held within the bequest to each person who at testator's death should be "in my service and * * * customarily employed as a part of my household in my country house.—Givens v. Whitney, N. Y. 190 N. Y. S. 177.

58.——Contracts To Devise Property Legal.—It is competent for a parent to contract with a child that, if the child will care for certain land and pay an annuity to the parent, the latter will devise such land to the child at his death, and the parent has no lawful right, after partial performance of the agreement on the part of the child, to alter his will so as to reduce the acreage of the place to be devised.—Goodwin v. Cornelius, Ore., 200 Pac. 915.

59.——Dower.—Where a bequest of the income of two-thirds of the residuary estate for benefit of the testator's widow was declared to be in lieu of dower, and the only change by codicil, by which the testator ratified and confirmed his will in every respect, says so far as any part was inconsistent with the codicil, was to limit the right of the wife to income so long as she remained a widow, the provisions as to dower are not inconsistent, and the codicil does not affect the will, so as to entitle the widow to dower in addition to the income.—In re Valentine's Will, N. Y., 190 N. Y. S. 155.

60.——Estoppel.—Where a will specifically provides that if any beneficiary should contest it, the bequest to such person should be revoked, a legatee, who has received his legacy and executed his release of all claim against the estate, is estopped from attacking the will.—King v. Rockwell, N. J., 115 Atl. 40.

61.——Gift Over.—A gift over to a church in case the first taker, testator's son, dies "during his minority, or childless," in the absence of anything else in the will to show a different intention, is to be read as though "or" were "and," so that the son becomes abolutely owner on attaining majority.—Williams v. Hicks, N. C., 108 S. E. 394

62.——"Heirs."—The word "heirs," both in its ordinary and in its technical signification, denotes those who take a person's real estate by inheritance upon his death, and when used in a will it will be given that meaning, unless the context and the circumstances under which it is employed undicate a different purpose.—Sherburne v. Howland, Mass., 132 N. E. 188,

63.——Remainders.—"On the death of my wife," "at the death of my wife," and like expressions in wills creating life estates denote the time or event on which remaindermen come into the right of possession and enjoyment, and do not control the time when the remainder vests.—Dowd v. Scally, Iowa, 184 N. W. 340.

64.——Construction.—Wife's will giving her property to her husband in trust to keep the same together for and during his natural life, to manage, control, and use it for the benefit of the children, with authority to use the income and to sell or mortgage any or all of the property according to his own judgment and discretion, without being accountable to the children, and providing that on husband's death the property "then left" should go to the children "then living," did not give the children an inheritable estate as of the time of the wife's death, but vested a life estate in the husband, it having been wife's apparent intention that husband, as well as children should participate in the income.—Bingham v. Sumner Ala., 89 So. 479.

65.——Undue Influence.—The mere fact that a trusted attorney of a testator, who bequeathed his property to a church of which both attorney and testator were devout members, drew the will and was named therein as executor, does not constitute the attorney a beneficiary under the will, nor raise a presumption of undue influence.—Kindt v. Parmenter, Okla., 200 Pac. 706.